No. [illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM NIKLAUS, MARY V. NIKLAUS AND LOUP RIVER PUBLIC POWER DISTRICT, A CORPORATION, PETITIONERS,

v.

THE [illegible]

[illegible]

[illegible]

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In The

SUPREME COURT OF THE UNITED STATES

WILLIAM NIKLAUS, MARY V. NIKLAUS AND LOUP RIVER PUBLIC POWER DISTRICT, A CORPORATION, PETITIONERS,

V.

THE LINCOLN JOINT STOCK LAND BANK, OF LINCOLN, NEBRASKA, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

HERBERT W. BAIRD,
Counsel for Petitioners.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petition of William Niklaus, Mary V. Niklaus, and Loup River Public Power District respectfully shows:

Petitioners are citizens of the United States and residents of the State of Nebraska. They seek a review of a

final decision and judgment of the Supreme Court of the State of Nebraska, entered June 29, 1943, in Case No. 31516, 143 Neb. —, 8 N. W. (2d) 545, wherein the petitioners are the defendants and appellants and respondent is the plaintiff and appellee impleaded with other persons, designated in the case as defendants and appellees.

Basis of the Jurisdiction of the Court.

This application is made under the authority of Section 8 (a) Act, February 13, 1925, 43 Stat. 940; 28 U. S. C. A. Section 350; Section 237 (b) of the Judicial Code; 28 U. S. C. A. Section 344 (b). It is made on the ground that the State of Nebraska, acting through the trial court in the first instance and by the Supreme Court of Nebraska, by final order of affirmance of the decree of the lower court, denied the petitioners rights, privileges and immunities especially set up and claimed by the petitioners in the trial and Supreme Court of the State under Section 1, Article 14, of the Amendments of the Constitution of the United States, otherwise designated as the "Due Process of Law" clause of said amendment.

Nature of the Case.

THE MATERIAL FACTS.

Petitioner, William Niklaus, acquired legal title to a tract of land consisting of about 623 acres of farm lands located in Lancaster County, Nebraska, by deed dated April 13, 1938, and filed for record April 14, 1938 (Trans. pp. 27, 32, 33, 34) from Amanda J. Erickson and Paul W. Erickson. His grantors acquired title by descent from H. E. Erickson (Trans. p. 27), who acquired title by warranty deed, under date of February 8, 1916, from

Lafayette P. Barnes, deed recorded December 10, 1925 (Trans. pp. 27, 32, 33, 34). Lafayette P. Barnes acquired title through mesne conveyances from the United States government. Petitioner, Mary V. Niklaus, is the wife of William Niklaus (Tran. p. 28). Petitioner, Loup River Public Power District, is the grantee of William Niklaus to an easement across a portion of said lands for the purpose of erecting and maintaining an electric power line thereon (Trans. p. 26).

William Niklaus entered into peaceable possession of the lands immediately after he acquired title and was in the actual, continuous possession thereof at all times since until he was evicted by a writ of assistance in manner and form hereinafter shown.

The respondent claims title to the same lands on the ground that on August 29, 1922, Lafayette P. Barnes executed and delivered to it his mortgage thereon to secure the sum of $35,000.00 alleged by respondent to be a loan to the mortgagor (Trans. pp. 19, 20, 21, 22) and that respondent did not know about the outstanding deed to H. E. Erickson until the date of its record, December 10, 1925 (Trans. pp. 27, 28). Respondent also claims title through the quit claim deed by Frank Rutherford, dated in July of 1934, recorded December 31, 1938 (Trans. pp. 25, 26). Frank Rutherford acquired a quit claim deed of the mortgagor's equity of redemption from the mortgagor, Lafayette P. Barnes, in 1925 (Trans. p. 25). Subsequent to July, 1934, the respondent was at all times the owner of the mortgagor's equity of redemption, but makes no claim to have ever been in possession of the lands.

On June 7, 1928, the respondent declared the mortgage of August 29, 1922, to be then due and payable and commenced an action for its foreclosure in the District Court of Lancaster County, Nebraska, against the mortgagor, his grantee, Frank Rutherford, and others, not, however, including the petitioners herein (Trans. pp. 24, 25).

The Laws of Nebraska Involved.

In defense of their title and possession of the lands, the petitioners claimed in the court below, and claim here, the protection of the following constitutional and statutory laws of Nebraska, to-wit:

1. Section 3, Article I, Nebraska Constitution; "No person shall be deprived of life, liberty or property without due process of law."

2. Section 6, Article I, Nebraska Constitution; providing that the right to trial by jury shall remain inviolate.

3. Section 20-1104, 1929 Compiled Statutes; providing that issues of fact arising in actions for the recovery of specific real property shall be tried by a jury unless a jury is waived.

4. Section 20-202, 1929 Compiled Statutes; providing that actions for the recovery of the title and possession of lands or for the foreclosure of mortgages thereon can only be brought within ten years after the cause of action shall have accrued.

Full copies of the foregoing cited laws are set forth in the appendix of the supporting brief herein attached.

The Gist of the Controversy.

The substance of this application is that petitioners were denied the equal protection of the above cited laws and were deprived of their right, title and interest in the lands involved and evicted therefrom by a writ of assistance ordered in a decree to foreclose the mortgage of August 29, 1922, by a court of equity in a suit to which the petitioners were neither necessary nor proper parties and in a cause of action barred by the statute of limitations on the date of its commencement, all appearing on the face of the petition upon which the decree was entered.

The Commencement and Culmination of the Case in the State Courts.

The action as, against the petitioners, was originally brought by the respondent as plaintiff, March 18, 1940, in the District Court of Lancaster County, Nebraska, on the equity side of the court by the filing of a petition entitled in the old action commenced June 7, 1928 (Trans. pp. 1-7). Petitioners were served with summons in the jurisdiction of Nebraska, issued on this petition, as original defendants (Trans. pp. 7, 8).

The petition which petitioners were summoned into court to answer was abandoned by the filing of another or substituted petition, under date of July 18, 1940 (Trans. pp. 8-29). After several amendments by interlineation the substituted petition was made to show on its face the facts as above stated, contained no allegations in avoidance of the statute of limitations and prayed that the mortgage of August 29, 1922, be foreclosed; that the mortgaged premises be sold as upon exe-

cution and the purchaser be put into possession (Trans. p. 28). To this petition, petitioners responded by answer (Trans. pp. 29-37, 38-43) objections to the jurisdiction of the court and motion to dismiss (Trans. pp. 43, 44) raising two matters of defense both appearing on the face of the petition: (1) That under Section 6, Article I, of the Nebraska Constitution, in connection with the statutory and common law rule that actions for the recovery of the possession of real estate, the issues of fact must be tried in a court of law before a jury, unless waived, the court of equity is without jurisdiction to litigate relative merits of the legal titles to the real estate claimed by the parties or to evict the peitioners as adverse claimants in possession of the lands involved. (2) That all claims of the plaintiff against the petitioners for the recovery of the lands arose not later than June 7, 1928, and were barred by the statute of limitations, not later than June 7, 1938 (Trans. pp. 29, 30, 31, 39).

Petitioners claimed their rights, privileges and immunities under Section 1, Article 14 of the Amendments to the Constitution of the United States (Trans. pp. 32, 33, 34, 35, 36) did not waive the right to a trial by jury and prayed for no affirmative relief (Trans. pp. 35, 36, 37, 42, 43).

Replication of plaintiff was general denials (Trans. pp. 45, 46).

The trial court ignored the federal question, overruled petitioners' objections to the jurisdiction of the court and plea of the statute of limitations and entered a decree in accordance with the prayer of plaintiff's petition and provided that petitioners be evicted from the lands involved by writ of assistance (Trans. pp. 46, 47, 48).

The petitioners herein appealed to the Supreme Court of Nebraska from said decree (Trans. p. 49) and prayed that the decree of the trial court be reversed, vacated and dismissed as to the appellants (Trans. p. 57). The case was submitted in the appellate court (Trans. p. 57) on the issues of law (1) and (2), supra, made by the pleadings resulting in an affirmance of the decree of the trial court (Trans. pp. 57, 58). The court below rendered an opinion which has been incorporated in the certified record herein (Trans. pp. 57-66). Petitioners, within the period of 40 days allowed by law, filed a motion for a rehearing (Trans. pp. 66-70) which was overruled (Trans. p. 70).

This last act by the Supreme Court of Nebraska disposed of all questions involved and left nothing for the trial court to do except to enter judgment according to the mandate. The Supreme Court of Nebraska is the appellate court of last resort in the state.

When and How the Federal Questions Were Raised.

The federal questions arising under subdivisions (1) and (2), supra, were raised by the petitioners in the trial court and in the Supreme Court of Nebraska at every opportunity and by every method available to petitioners.

IN THE TRIAL COURT.

In the trial court petitioners included in their answer, the following:

> "That William Niklaus, one of these answering defendants, does by this answer stand upon his constitutional right to have all issues of fact, pertaining to the validity or invalidity of his legal title in and

to said lands, to be tried before a jury in a court of law as provided by law. That this court as a court of equity, sitting in a proceeding to foreclose the pretended mortgages or any of them described in plaintiff's petition is without jurisdiction to hear and determine any issue relating to the rights of this defendant in said land because a court of law is the only forum in which to settle and determine adverse legal titles to real estate under Section 6, Article 1 of the Constitution of Nebraska. That said defendant does hereby object and refuse to submit to this court in this foreclosure proceeding any issue of fact, pertaining to his title in and to said lands. That any action that this court might see fit to take in the premises adversely, affecting the legal rights of this defendant, will be an invasion of the constitutional rights of this defendant, guaranteed to this defendant by Sections 3 and 6, Article 1, of the Constitution of Nebraska and of the Due Process of Law clause of the 14th amendment of the Constitution of the United States" (Trans. pp. 35, 36, 42, 43).

IN THE SUPREME COURT OF NEBRASKA.

Under the rules of practice existing in Nebraska, with respect to appeals to the Supreme Court of the state, all points of law relied upon for the reversal or modification of a decree or judgment of the trial court must be raised under the heading, "Propositions of Law," and the authorities in support thereof discussed under the heading "Argument" in appellants' brief filed in the said appellate court. The record herein shows that throughout appellants' brief, duly and timely filed in the Supreme Court of Nebraska, appellants raised the federal question under the headings, "Statement of the Case" (Trans. pp. 49, 50, 51, 52), "Propositions of Law" (Trans. pp. 52, 53, 54), and "Argument" and cited decisions of

this court in support thereof (Trans. pp. 54, 55, 56, 57); in the motion for a rehearing (Trans. pp. 67, 68, 69).

The Opinion of the Court Below.

The court below ignored the federal questions, thus raised and sustained its judgment of affirmance on non-federal grounds of decision that are clearly without any fair or substantial support and are plainly untenable; by implication it nullified Sections 3 and 6, Article 1 of the Bill of Rights of the Constitution of Nebraska, repealed Section 20-1104, 1929 Compiled Statutes of Nebraska, repudiated its former opinions in *Yager* v. *Exchange Nat. Bank*, 52 Neb. 321, 72 N. W. 211; *Lett* v. *Hammond*, 59 Neb. 339, 80 N. W. 1042; *Sharmer* v. *McIntosh*, 43 Neb. 509, 61 N. W. 727; *Standard Oil Co.* v. *O'Hare*, 126 Neb. 11, 252 N. W. 398; *Hollinrake* v. *Neeland*, 94 Neb. 530, 143 N. W. 809; *Warlier* v. *Williams*, 53 Neb. 143, 73 N. W. 539; *Urlau* v. *Ruhe*, 73 Neb. 807, 103 N. W. 670; *Smith* v. *White*, 62 Neb. 56, 86 N. W. 930; *Shellenbarger* v. *Biser*, 5 Neb. 195; *Urlau* v. *Weeth*, 63 Neb. 883, 89 N. W. 427; *Ryan* v. *Donley*, 2 Neb. (Unof.) 6, 96 N. W. 49; *Joslin* v. *Williams*, 61 Neb. 859, 86 N. W. 473; denied the supremacy of the Constitution of the United States, and, for the purposes of this case, set up an autocracy in its place and stead.

On the issue of the statute of limitations the case was submitted to the court below on the facts appearing on the face of the plaintiff's petition and the plea of the statute of limitations contained in the petitioner's answers (Trans. pp. 29-31, 39). At some time after the case was argued and submitted in the appellate court (Trans. p. 57) and the date of the order of affirmance (Trans. pp. 57, 58) and without notice to petitioners and

without an opportunity to be heard thereon, the court below, on its own motion, interpolated in the case the following facts: "From March 9, 1929, until sometime in 1938 the appellee herein was restrained and enjoined by the federal court from proceeding further and the trustee of said court during that period was in possession of the premises" (Trans. p. 63).

No such matters are pleaded in the plaintiff's petition or replies and form no part of the record of the case.

The fallacies and sophistries by which the opinion is impregnated are pointed out and discussed in detail in the supporting brief hereto attached.

The Main Points Involved.

The question before this court, on the merits, is whether the State of Nebraska, acting through the judicial branch of its government, has disregarded the provisions of Section 1, Article 14, of the Amendments to the Constitution of the United States, by a denial of the equal protection of the state constitutional and statutory laws, above cited, and has thereby deprived the petitioners of their property without due process of law.

The question is separable into two subdivisions:

1. Whether the judge of the trial court, sitting as a court of equity, had the power or jurisdiction under the constitutional and statutory laws of Nebraska above referred to, to summarily evict the petitioners, as independent title holders in possession, from their lands by a decree in a mortgage foreclosure suit providing for their eviction by writ of assistance, over the objections of the petitioners, that the court was without jurisdiction and that the resulting decree was and is void, and whether

the exercise of that jurisdiction was a denial of the equal protection of the law and a deprivation of property without due process of law.

2. Whether the action of the court below in supplying, on its own motion, the following statement of facts dehors the record: "From March 9, 1929, until sometime in 1938, the appellee herein was restrained and enjoined by the federal court from proceeding further and the trustee of said court during that period was in possession of the premises" (Trans. p. 63), and in deciding the issue on the statute of limitations on the basis of the supplied facts, adverse to the substantial property rights of the petitioners, was equivalent to the entry of a judgment against the petitioners on the court's own motion without notice and opportunity to be heard in opposition thereto and thereby a deprivation of property without due process of law and a denial of the equal protection of the Nebraska statute of limitations. (Substance of the statute are set forth supra. Full copy set forth in appendix to supporting brief hereto attached.)

Reasons For the Allowance of the Writ and the Citations in Support Thereof.

It is urged that the writ of certiorari should issue for the following reasons:

1. The final judgment of the court below is a clear instance of injustice and of a denial of federal constitutional rights, stripping the petitioners of their property and all other remedy. *Ward* v. *Love*, 253 U. S. 17, 22, 64 L. Ed. 751, 758; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 232, 41 L. Ed. 979, 983, 17 Sup. Ct. Rep.

581; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 36, 52 L. Ed. 78, 87, 28 Sup. Ct. Rep. 7; *Georgia Power Co.* v. *Decatur*, 281 U. S. 505, 508, 74 L. Ed. 999, 1003; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107; *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254.

2. It is one of the constitutional duties of this court to protect and maintain the supremacy of the Constitution of the United States and to resist stealthy encroachments upon the fundamental rights, privileges and immunities of the people. *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 24, 80 L. Ed. 1015, 1025; *Boyd* v. *United States*, 116 U. S. 616, 635, 29 L. Ed. 746, 752, 6 Sup. Ct. 520; *Byars* v. *United States*, 273 U. S. 28, 32, 71 L. Ed. 520, 523.

3. Appellate proceedings to this court is the only remedy open to a litigant who has been deprived of his property by a state, acting through its court of last resort, against the practice of rendering judgment without notice and an opportunity to be heard, upon assumed facts interpolated in the case by the state court dehors the record.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

Your petitioners respectfully represent to the court that the questions involved are substantial and important. If the decision of the court below is permitted to stand it will be a precedent that is in conflict with every precept of law, constitutional, statutory or moral and strikes at the heart of constitutional government.

The action of the court below in sustaining the jurisdiction of a court of equity to litigate legal titles to real

estate and evict adverse claimants therefrom, without first exhausting the legal remedy of trial by jury, is opposed to the Bill of Rights enjoyed by subjects of Anglo Saxon jurisprudence since Magna Charta and preserved in the Federal and State Constitutions of the United States. With the single exception of the case at bar, such right has never before been denied by any court of last resort in the United States, by permitting a court of equity to exercise such power. On the other hand the courts have zealously and uniformly guarded against such usurpation of jurisdiction of a court of law (see authorities collected supporting brief hereto attached). If the decision of the court below is permitted to stand unreversed, it will be a precedent sustaining the power of the Supreme Court of Nebraska to nullify the Bill of Rights of the Constitution of Nebraska, and by judicial fiat, repeal the statutes of Nebraska, at the will and caprice of the court and for the ultimate abolition of a Republican form of government in Nebraska.

On the issue of the statute of limitations the court below interpolated in its opinion facts which it assumed avoided the statute and which are not found in the pleadings, whereby the petitioners were deprived of their property without notice and an opportunity to be heard —a stealthy encroachment upon the rights, privileges and immunities of the people. A condemnation of such practice is desirable.

By the opinion and judgment, the court below elevated the will and caprice of the judiciary above the State and Federal Constitutions; it violated the cardinal precept upon which the constitutional safeguards of personal rights ultimately rest—that this shall be a government

of laws and not an autocracy or government by men; it exercised arbitrary power and discrimination antagonistic to, and incompatible with, constitutional government.

Your petitioners respectfully show to the court that this is a case of great importance to your petitioner, William Niklaus, because he was deprived of the title and possession of some 623 acres of valuable land by a purely arbitrary and capricious exercise of judicial power whereby a wrongful and highly injurious invasion of his property rights is sustained, stripping him of his property and of all real remedy.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of the State of Nebraska to the end that the judgment of the Supreme Court of Nebraska may be reviewed and reversed by this Honorable Court.

Respectfully submitted,

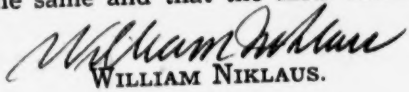
WILLIAM NIKLAUS,
MARY NIKLAUS, and
LOUP RIVER PUBLIC POWER DISTRICT,

By WILLIAM NIKLAUS, *Pro Se.*
HERBERT W. BAIRD,
Counsel for Petitioners.

STATE OF NEBRASKA)
) ss.
LANCASTER COUNTY)

William Niklaus being furst duly sworn deposes and says that he is one of the petitioners named in the within

and foregoing application for Writ of Certiorari that he has read the same and that the facts therein stated are true.



WILLIAM NIKLAUS.

Subscribed and sworn to before me this 24th day of August, 1943.

LOUIS B. FINKELSTEIN,
Notary Public.

SUPPORTING BRIEF.

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

The opinion of the court below in this case is officially reported in 143 Neb. __ 8 N. W. 2nd, 545.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This application for a writ of certiorari to the Supreme Court of Nebraska is made under the authority of Title 28 U. S. C. A., Sections 344 (b), 350, on the ground that the State of Nebraska, acting through its Supreme Court, by final order of affirmance of a decree of the District Court of Lancaster County, Nebraska, denied the petitioners' titles, rights, privileges and immunities, especially set up and claimed by answers filed in the trial court (Trans. pp. 36, 43) in appellants' brief and motion for rehearing in the Supreme Court (Trans. pp. 49-57), under Article XIV, Section I, of the Amendments of the Constitution of the United States.

The case is of sectional and national importance because it introduces a practice in judicial procedure which marks the beginning of the end of constitutional government, both State and Federal, in Nebraska.

STATEMENT OF THE CASE.

The Facts.

The facts giving rise to the issues of law herein discussed are not in dispute and are found in the petition upon which the case was tried, and concisely stated, are:

Immeditely prior to February 8, 1916, Lafayette P. Barnes was the owner of the lands involved, his title originating from the government of the United States. On February 8, 1916, he transferred this title to H. E. Erickson by warranty deed duly recorded December 10, 1925. In November, 1932, H. E. Erickson died intestate while the owner of the lands, his title descending to his lawful heirs, his wife, Amanda J. Erickson and son, Paul W. Erickson. On April 13, 1938, the last named persons transferred the title to William Niklaus, by deed duly recorded April 14, 1938 (Trans. p. 27). William Niklaus entered into the peaceable possession of said lands under his deed, and claims that he and his grantors, immediate and remote, have been in the actual, exclusive continuous open, hostile and adverse possession thereof under their respective muniments of title for more than the statutory period of ten years immediately prior to March 18, 1940 (Trans. pp. 32-34, 39-41).

Petitioner Mary V. Niklaus is the wife of the said William Niklaus. The Loup River Public Power District is interested only as grantee of William Niklaus of an easement across a portion of said lands (Trans. pp. 26, 28).

On August 29, 1922, the said Lafayette P. Barnes, acting in fraud of the rights of H. E. Erickson and in disregard of the covenants of warranty of his deed of February 8, 1916, executed a mortgage on the same lands to the respondent herein under such circumstances as to raise the inference that respondent was implicated in the fraud (Trans. pp. 15-25). In July of 1925, Lafayette P. Barnes made a deed purporting to convey whatever interest he had to Frank Rutherford (Trans. p. 25).

On June 7, 1928, the respondent declared the mortgage above mentioned to be then due and payable, commenced an action for its foreclosure against Frank Rutherford, et al., not including the petitioners herein. While the suit was pending respondent acquired title to the mortgagor's equity of redemption in the res, by deed dated July, 1934, recorded December 31, 1938, and discontinued the pending suit (Trans. pp. 25, 26).

Respondent never was in possession and admits knowledge of the ownership of the lands in H. E. Erickson and his successors in title as early as December 10, 1925 (Trans. pp. 27, 28).

Proceedings in the State Courts.

The action against the petitioners was originally commenced in the District Court of Lancaster County, Nebraska, on March 18, 1940, by the filing of a petition in equity in the nature of a suit to foreclose the mortgage of August 29, 1922, and the issuance of summons and service thereof (Trans. pp. 1-8). Petitioners responded by answer (Trans. pp. 8-15).

On July 18, 1940, plaintiff filed another petition against the same defendants (Trans. pp. 8-29).

To this petition petitioners responded by answer, objections to the jurisdiction of the court, and motion to dismiss (Trans. pp. 29-44).

Plaintiff replied by general denials (Trans. pp. 45, 46).

The trial court overruled objections to the jurisdiction of the court and motion to dismiss (Trans. p. 45). On May 27, 1942, the trial court entered a decree on the last petition extinguishing the title of the petitioners in and to the lands involved and provided for their eviction

by writ of assistance (Trans. pp. 45-48). From this decree petitioners seasonably appealed to the Supreme Court (Trans. pp. 49-57).

March 19, 1943, the appellate court affirmed the decree of the trial court and wrote an opinion (Trans. pp. 57, 58-66).

Petitioners seasonably filed a motion for a rehearing which was overruled June 29, 1943 (Trans. pp. 66-70), and mandate issued on same day. On June 30, 1943, petitioners filed motion to recall mandate (Trans. pp. 70-71). On July 14, 1943, filed praecipe for certified transcript of the record for use in this court in an application for writ of certiorari (Trans. pp. 72-74). July 26, 1943, motion to recall mandate sustained, mandate recalled (Trans. p. 74). Transcript of record certified August 14, 1943 (Trans. p. 74).

The Issues Tried in the State Courts.

The issues tried in the state courts were made up from the facts alleged in the plaintiff's petition and the pleas, defenses, and claims asserted in petitioners' answers. Petitioners prayed for no affirmative, relief, merely asked that the petition of plaintiff be dismissed as to them, on legal grounds (Trans. pp. 37, 43).

The sole and only object and purpose of the petition was to extinguish the petitioners' title and evict them from their lands by a proceeding in equity in the nature of a suit to foreclose a mortgage shown by the petition to have been paid, settled and satisfied (Trans. pp. 15-29).

In their answers and motion the petitioners set up the following defenses:

1. That petitioners' were adverse claimants in possession of the res claiming title of record and by adverse possession for more than ten years, immediately prior to the commencement of the suit against them, and such title was prior paramount and adverse to both the mortgagee and mortgagor (Trans. pp. 33, 40).

2. That the petition was a nullity because of the absence of a necessary defendant and that plaintiff, the mortgagee and owner of the mortgagor's equity of redemption were one and the same party (Trans. pp. 32-35, 39-41).

3. That petitioners were neither necessary nor proper parties to the suit; that there was a misjoinder of parties and causes of action (Trans. pp. 35, 41, 44).

4. That under Article I, Section 6, Nebraska Constitution and the statutory laws of Nebraska, the court of equity was without jurisdiction to litigate the merits of petitioners legal title to the res or to evict them therefrom (Trans. pp. 35, 42, 44).

5. That the petition shows on its face that the cause of action on the mortgage of August 29, 1922, accrued June 7, 1928, and under the Nebraska statute of limitations the claim for its foreclosure was extinguished June 7, 1938 (Trans. pp. 29-30, 38, 39).

6. That the cause of action, if any, arising because the plaintiff did not know about the outstanding title of H. E. Erickson until December 10, 1925 (Trans. pp. 33, 34, 39, 40, 41) accrued December 10, 1925, and extinguished December 10, 1935 (Trans. pp. 30, 39).

7. That a decree entered upon the petition in conformity with the prayer thereof would be repugnant the constitutional rights of the petitioners guaranteed to

them by Article I, Sections 3 and 6 of the Nebraska Constitution, the "Due Process of Law" clause of the 14th Amendment of the Constitution of the United States and would be void (Trans. pp. 36, 43).

Upon appeal to the Supreme Court of Nebraska, the case was tried and submitted upon the pleadings only and the same defenses were urged in appellants' briefs (Trans. pp. 49-57).

On the issue of the statute of limitations the Supreme Court of Nebraska was unable to sustain the decree of the trial court on the *facts before it and as alleged in the plaintiff's petition. It therefore modified the facts, dehors the record and upon the changed record entered its order of affirmance.*

The Points Involved In This Court.

The issue in this court is whether the Supreme Court of Nebraska denied the petitioners the equal protection of Article I, Sections 3 and 6 of the State Constitution, 20-1104, 20-202, Compiled Statutes, Nebraska, 1929, deprived the petitioners of their property without due process of law, by its final judgment of affirmance of the decree of the trial court extinguishing the petitioners' title to the res and providing for their summary eviction therefrom.

The constitutional and statutory laws above referred to are set forth in full in the appendix herein.

SPECIFICATION OF ERRORS.

The court below, as an agency of the State of Nebraska, by its final order of affirmance, made June 29, 1943, of the decree of the District Court of Lancaster County,

Nebraska, filed May 27, 1942, in this case, erred in disregarding the rights, privileges and immunities, properly and timely claimed by the petitioners and guaranteed to them by Section 1, Article 14, of the Amendments of the Constitution of the United States, in failing and refusing to vacate, reverse and set aside the said decree of said trial court and in failing and refusing to dismiss the plaintiff's petition, as to petitioners herein for the following reasons, to-wit:

1. The decree affirmed is void.

2. The decree affirmed denies the petitioners the equal protection of Article I, Section 3, Constitution of Nebraska.

3. The decree affirmed denies the petitioners the equal protection of Article I, Section 6 of the Constitution of Nebraska and Section 20-1104, 1929 Compiled Statutes of Nebrsaka.

4. The decree affirmed denies the petitioners the equal protection of the Statute of Limitations, Section 20-202, 1929 Compiled Statutes of Nebraska.

5. The court below erred in framing, supplying on its own motion, dehors the record, and entering up a judgment against the petitioners thereon, without notice, trial, hearing or an opportunity to be heard in opposition thereto, the following statement of facts.

> "From March 9, 1929, until sometime in 1938, the appellee herein was restrained and enjoined by the federal court from proceeding further and a trustee of said court during that period was in possession of the premises."

SUMMARY OF POINTS AND ARGUMENT.

POINT A—A petition for the foreclosure of a mortgage, in the absence of a necessary defendant is a nullity.

POINT B—A petition or complaint for the foreclosure of a mortgage which makes adverse claimants in possession of the real estate parties defendant for the purpose of litigating and settling their rights in such a suit is bad for misjoinder of parties and of causes of action.

POINT C—In jurisdictions having constitutional provisions to the effect that the right to trial by jury shall remain inviolate and the common law or statutory rule that in actions for the recovery of specific real estate, the issues of fact shall be tried by a jury, in the absence of a waiver, a court of equity has no jurisdiction to litigate the merits of disputed legal titles to real estate or to evict adverse claimants therefrom.

POINT D—No judgment without jurisdiction in the court is due process of law.

POINT E—A claimant in possession of real estate has a substantive right in the completed bar of the statute of limitations against suits for the recovery of such property. The arbitrary removal of the bar of the statute by the court is the same as arbitrarily taking the property from one person and subjecting it to the extinguished claim of another and is inconsistent with constitutional provisions forbidding a deprivation of property without process of law.

POINT F—The court below sustained its judgment of affirmance on non-Federal grounds of decision that are clearly without any fair or substantial support and are plainly untenable.

POINT G—The only method, under the statute and the rules of the Supreme Court of Nebraska to claim a title, right, privilege or immunity under the Federal Constitution, denied by the inferior court, is in the brief of the appellant prepared as provided by the rules of the court.

POINT H—The writ of certiorari should be granted; the case heard on its merits and the judgment of the court below reversed.

ARGUMENT.

Point A.

A petition for the foreclosure of a mortgage, in the absence of a necessary defendant is a nullity.

SPECIFICATION OF ERRORS (1).

The substituted petition upon which the case was tried shows that all of the defendants were neither necessary nor proper parties.

Lafayette P. Barnes and Lottie M. Barnes were the mortgagors who had parted with any and all interest in the premises, first by warranty deed to H. E. Erickson February 8, 1916, and by deed to Frank Rutherford July, 1925, and no deficiency judgment was prayed for.

Amanda J. Erickson, Paul W. Erickson and wife, Ann Louise, were neither parties to the mortgage nor in privity with the mortgagor and had parted with any and all interest in the lands, April 13, 1938.

The petitioners herein were not parties to the mortgage, had no interest in the mortgaged premises acquired through the mortgagor subsequent to the mortgage, were

in possession under a legal title prior paramount and adverse to both the mortgagor and mortgagee and were, therefore, neither necessary nor proper parties.

Dial v. *Reynolds*, 96 U. S. 340, 24 L. Ed. 644.
Peters v. *Bowman*, 98 U. S. 56, 25 L. Ed. 91, 92.
Shellenbarger v. *Biser*, 5 Neb. 195.
Joslin v. *Williams*, 61 Neb. 859, 86 N. W. 473.
Ryan v. *Donley*, 2 Neb. (Unof.) 6, 96 N. W. 49.
Urlau v. *Weeth*, 63 Neb. 883, 89 N. W. 427.
Hambrick v. *Russel*, 86 Ala. 199, 5 So. 298.
Adams v. *Edgerton*, 48 Ark. 419.
San Francisco v. *Lawton*, 18 Cal. 465, 79 Am. Dec. 187.
Lander v. *Persky*, 85 Conn. 429, 83 Atl. 209.
Broward v. *Hoeg*, 15 Fla. 370.
Gage v. *Perry*, 93 Ill. 176.
Pattison v. *Shaw*, 6 Ind. 377.
Wilkerson v. *Daniels*, (Ia.) 1 Green 179.
Tome v. *Loan Co.*, 34 Md. 12.
Summers v. *Bromely*, 28 Mich. 125.
Banning v. *Bradford*, 21 Minn. 308.
Murphey v. *Cannon*, 18 Mont. 348.
Coe v. *New Jersey, etc. Ry. Co.*, 31 N. J. Eq. 105.
Dummond v. *Baker*, 38 N. Y. S. 557.
Bogey v. *Shute*, 57 N. C. 174, 4 Jones Eq. 174.
DeWattevile v. *Sims*, 44 Okla. 708, 146 Pac. 224.
Farmers Nat. Bank v. *Gates*, 33 Ore. 388, 72 Am. St. Rep. 724, 54 Pac. 205.
Evans v. *McLucas*, 12 S. C. 56.
Faubion v. *Rogers*, 66 Tex. 472.
Sidney Stevens Implement Co. v. *So. Ogden Lands Co.*, 20 Utah 267, 58 Pac. 843.
Kingsley v. *Scott*, 58 Vt. 470, 5 Atl. 390.

Lange v. *Jones,* 5 Leigh. (Va.) 192.
Kizer v. *Caufield,* 17 Wash. 417, 49 Pac. 1064.
Whitney v. *Robinson,* 53 Wis. 309.

See numerous other cases cited in Bancroft's Code Practice and Remedies, Vol. 6, Section 5002, Jones on Mortgages, 8th ed., Secs. 1831, 1842, Wiltsie on Mortgage Foreclosures, 5th ed., Secs. 401, 402, note 68 Am. St. Rep. 354, 355, 356, the latter discussed infra under Point C.

Defendants, Lee Lewis, Marie Lewis, and Lurton Tremain, could claim no interest in the subject matter except through William Niklaus.

The petition, as one for the foreclosure of a mortgage, fails to name a defendant who has or claims any interest in the subject matter (mortgagor's equity of redemption) or the event of the suit. The plaintiff is also the only necessary defendant. Under such circumstances the petition is a nullity. *Widner* v. *Lane,* 14 Mich. 124.

The court below stated in its opinion that petitioners herein were proper, if not necessary parties. This view is in direct conflict with all its previous decisions and all other authorities above referred to and finds no support by any reported case of any court of last resort in the United States.

Point B.

A petition or complaint for the foreclosure of a mortgage which makes adverse claimants in possession of the real estate parties defendant for the purpose of litigating and settling their rights in such a suit is bad for misjoinder of parties and of causes of action.

SPECIFICATION OF ERRORS (1) AND (2).

Under Point A, supra, we have shown that plaintiff had and claimed no grievance whatever against any of the named defendants *on the mortgage* sued upon.

The facts alleged in the petition show that whatever cause of action the plaintiff may have had against William Niklaus and those claiming under or through him was an action at law for ejectment.

The joinder of the two groups of defendants and the two causes of action in one proceeding is not permissible. *Dail* v. *Reynolds*, 96 U. S. 340, 24 L. Ed. 644; *Wells* v. *Am. Mtg. Co.*, 109 Ala. 430, 20 So. 136; *Chamberlain* v. *Lyell*, 3 Mich. 448.

In its opinion the court below justified the joinder of the two causes of action on the ground that it avoided a multiplicity of suits.

In *Warlier* v. *Williams*, 53 Neb. 143, 145, 73 N. W. 539, 540, the court below previously held that the mere fact that there exist divers causes of action which may be the foundation for as many different suits between the parties thereto, is no ground upon which equity may be called upon to assume jurisdiction to evict a claimant in possession of real estate, by injunction process, and that the argument that such procedure avoids a multiplicity of suits is untenable.

Point C.

In jurisdictions having constitutional provisions to the effect that the right to trial by jury shall remain inviolate and the common law or statutory rule that in actions for the recovery of specific real estate, the issues of fact shall

be tried by a jury, in the absence of a waiver, a court of equity has no jurisdiction to litigate the merits of disputed legal titles to real estate or to evict adverse claimants therefrom.

SPECIFICATION OF ERRORS (1) AND (3).

The right to trial by jury in law cases and denial of jurisdiction of a court of equity under Section 6, Article I, Nebraska Constitution, and Section 20-1104, 1929 Compiled Statutes, has been observed, established and enforced by the Supreme Court of Nebraska in a long line of well considered cases. *Mills* v. *Miller*, 3 Neb. 87, 94; *Lamaster* v. *Scofield*, 5 Neb. 148, 155, 156; *Kinkaid* v. *Hiatt*, 24 Neb. 562, 579; *Yager* v. *Exchange Nat. Bank*, 52 Neb. 321, 324, 72 N. W. 211; *Warlier* v. *Williams*, 53 Neb. 143, 73 N. W. 539; *Lett* v. *Hamond*, 59 Neb. 339, 80 N. W. 1042; *Smith* v. *White*, 62 Neb. 56, 62, 86 N. W. 930, 932; *Urlau* v. *Ruhe*, 73 Neb. 807, 103 N. W. 670; *Hollinrake* v. *Neeland*, 94 Neb. 530, 143 N. W. 809; *Standard Oil Co.* v. *O'Hare*, 126 Neb. 11, 252 N. W. 398.

Perhaps the most leading case above cited is *Yager* v. *Exchange Nat. Bank*. In this case the Supreme Court of Nebraska held flatly that when the case falls within the provisions of Section 20-1104, supra, then, under the constitution, a court of equity is without jurisdiction and the right to a trial by jury will not be defeated because, in order to accomplish the main object of the action, it becomes necessary to determine issues as to the existence of equitable rights. Where the object of the action is to recover specific real estate the remedy is ejectment.

This principle has been strictly adhered to in Nebraska until the decision in this case.

The rule has been observed and applied by this court in the cases of: *Hipp* v. *Babin*, 19 How. 271, 278 (60 U. S. XV 635), 15 L. Ed. 633, 635; *Lewis* v. *Cocks*, 23 Wall. 466 (90 U. S.), 23 L. Ed. 70; *Parker* v. *Win. L. C. & W. Co.*, 2 Black 545 (67 U. S. XV 333), 17 L. Ed. 333.

It has been universally enforced in other jurisdictions, with reference to the same or similar constitutional and statutory provisions: *Cole* v. *Mette*, 65 Ark. 503, 47 S. W. 407; *Donahue* v. *Meister*, 88 Cal. 121, 25 Pac. 1096; *Davis* v. *Judson*, 159 Cal. 121, 113 Pac. 147; *Roy* v. *Moore*, 85 Conn. 159, 82 Atl. 233; *Atkinson* v. *Crowe*, 80 Kan. 161, 165, 102 Pac. 50; *Weeks* v. *Brooks*, 205 Mass. 458, 92 N. E. 45; *Tabor* v. *Cook*, 15 Mich. 322; *Frowein* v. *Poage*, 231 Mo. 82, 132 S. W. 241; *Lee* v. *Conran*, 213 Mo. 404, 111 S. W. 1151; *Stonecifer* v. *Yellow Jacket Silver Mine Co.*, 3 Nev. 38; *Gill* v. *Fixico*, 77 Okla. 151, 187 Pac. 474, 476; *Smith* v. *Cain*, 69 Ore. 479, 139 Pac. 576; *North Pa. Coal Co.* v. *Snowden*, 42 Pa. 488, 82 Am. Dec. 530; *Bratton* v. *Catawba Power Co.*, 80 S. C. 260, 60 S. E. 673; *Philips Church* v. *Zion Presb. Church*, 23 S. C. 297; *Nelson* v. *Jordeth*, 15 S. D. 46, 87 N. W. 140; *State* v. *Fraisier*, 22 S. D. 291, 117 N. W. 366; *Childs* v. *Missouri R. Co.*, 221 Fed. 219 (C. C. A. 8). The constitutional provision above referred to, is the basis for the universal rule that in mortgage foreclosure suits adverse claimants in possession of the mortgaged premises are neither necessary nor proper parties and the decree can have no effect upon their rights. *Lyon* v. *Powel*, 78 Ala. 351; *Hambrick* v. *Russel*, 86 Ala. 199, 5 So. 298; *Gage* v. *Perry*, 93 Ill. 176; *Summers* v. *Bromley*, 28 Mich 125; *Pool* v. *Horton*, 45 Mich. 404, 8 N. W. 59; *Corning* v. *Smith*, 6 N. Y. 82; *Eagle Fire Co.* v. *Lent*,

6 Paige 637 (N. Y.); *Meigs* v. *Willis,* 5 N. Y. Civ. Proc. 106, 66 How. Pr. 466; *Emigrant Industrial Savings Bank* v. *Goldman,* 75 N. Y. 127; *Dumond* v. *Baker,* 38 N. Y. S. 557; *Bogey* v. *Shute,* 57 N. C. 174, 4 Jones Eq. 174; *Marshal* v. *Pitts,* 38 S. C. 390, 17 S. E. 831; *Faubion* v. *Rogers,* 66 Tex. 472; *Lange* v. *Jones,* 5 Leigh 192 (Va.); *Kingsley* v. *Scott,* 58 Vt. 470, 5 Atl. 390; *Oates* v. *Shuey,* 25 Wash. 597, 66 Pac. 58; Bancroft's Code Practice and Remedies, Vol. 6, Section 5002; Jones on Mortgages, 8th ed., Sections 1831, 1842; Wiltsie on Mortgage Foreclosures, 5th ed., Sections 401, 402; Note 68 Am. St. Rep. 356.

The source of all of the decisions above cited pertaining to the rights of adverse claimants in mortgage foreclosure cases is found in the decision in the case of *Lange* v. *Jones,* 5 Leigh (Va.) 192, wherein the Virginia court held:

> "A court of equity has no jurisdiction to settle the title and bounds of lands between adverse claimants, unless the plaintiff has some equity against the party claiming adversely to him."

In *Eagle Fire Co.* v. *Lent* (N. Y.), supra, the New York court followed *Lange* v. *Jones* and *Corning* v. *Smith,* supra, followed *Eagle Fire Co.* v. *Lent.* In *Shellenbarger* v. *Biser,* 5 Neb. 195, the cases of *Eagle Fire Co.* v. *Lent* and *Corning* v. *Smith,* are cited on page 198 of the Nebraska reports. These two New York cases are cited with approval in practically all the leading cases on the subject.

The decree of the trial court herein was rendered by a court without jurisdiction and is void.

In the opinion the court below held the decree to be valid, thereby holding that the trial court had jurisdic-

tion. The court reached the conclusion, not upon authority but by argument which we claim is purely sophistical and untenable. The writer of the opinion took for his major premise the second and third sentences of the first paragraph of the monographic note, 68 Am. St. Rep. 354 (Trans. p. 61), and upon an argument based thereon came to the conclusion that the decree of the trial court *did* affect the rights of the petitioners herein, whereas the author of the note, using the same premise, came to just the opposite conclusion. We quote the first, third and fourth paragraphs of the note. The parts quoted by the court are set out in black faced type.

> "At the outset of our inquiry into this subject it will be of assistance to state, and to keep in mind during later investigations, several propositions, so well settled that the citation of supporting authorities would be superfluous, and sufficiently removed from the exact question in hand to render anything more than a bare statement of them a little less than inexcusable. **The foreclosure of a mortgage is an equitable proceeding. It is a matter of which chancery has inherent original jurisdiction, and in the many states where statutes have been enacted conferring jurisdiction of such matters upon equity courts, and in those where the distinction between law and equity has been abolished, the foreclosure of mortgages follows the principles and rules of practice already established by courts of equity in the exercise of their general jurisdiction.**
>
> "*The foreclosure of a mortgage is intended merely to determine the existence of the mortgage lien and nothing else, to ascertain the amount due and to obtain a decree directing the sale of the premises for its satisfaction*: McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655; Boggs v. Fowler, 16 Cal. 566; 76 Am. Dec. 561; San Francisco v. Lawton, 18 Cal.

465; 79 Am. Dec. 187. *Its proper scope and effect is to bar the rights of the mortgagor and those claiming under him:* See monographic note to King v. Mason, 89 Am. Dec. 434. *It is not a proper proceeding for the investigation of land titles:* Jones on Mortgages, 4th ed., Sec. 1444; *and by the preponderance of authority the title to realty is not properly triable in foreclosure proceedings:* See monographic note to King v. Mason, 89 Am. Dec. 434. It is well established that subsequent mortgages or incumbrancers, claiming priority of liens, are proper defendants in a foreclosure suit for litigating that issue, because the only proper object of the proceeding is to bar all rights subsequent to the mortgage. See monographic note to Strobe v. Downer, 80 Am. Dec. 714.

"By an equal agreement of the authorities, the proposition is established as the corollary and companion of that stated in the preceding paragraph, *that the object of an action to foreclose a mortgage is to bar the mortgagor and those claiming under or through him and subsequent to the mortgage, and that in such an action questions of title, adverse or paramount, cannot be litigated:* Hambrick v. Russell, 86 Ala. 199; Randle v. Boyd, 73 Ala. 282; Lyon v. Powell, 78 Ala. 351; Adams v. Edgerton, 48 Ark. 419; Dial v. Reynolds, 96 U. S. 340; Chapin v. Walker, 2 McCrary, 175; San Francisco v. Lawton, 18 Cal. 465; 79 Am. Dec. 187; Gage v. Perry, 93 Ill. 176; Whittemore v. Scheill, 14 Ill. App. 414; Summers v. Bromley, 28 Mich. 125; Horton v. Saunders, 13 Mich. 409; Comstock v. Comstock, 24 Mich. 39, and note citing cases; Manning v. Bradford, 21 Minn. 308; 18 Am. Rep. 398; Coe v. New Jersey etc. Ry. Co., 31 N. J. Eq. 105; Eagle Fire Co. v. Lent, 6 Paige 635; Corning v. Smith, 6 N. Y. 82; Merchants' Bank v. Thomson, 55 N. Y. 7; Rathbone v. Hooney, 58

N. Y. 463; Faubion v. Rogers, 66 Tex. 472; Wolf v. Harris, Tex. Civ. App., Dec. 1898; Kinsley v. Scott, 58 Vt. 470; Pelton v. Farmin, 18 Wis. 222; Whitney v. Robinson, 53 Wis. 309; California etc. Trust Co. v. Cheney Electric Light etc Co., 12 Wash. 138.

"*The litigation of such titles in foreclosure proceedings is refused because equity will not usurp jurisdiction to try the validity of a legal title which is independent of the mortgage and accrued prior to its execution:* Lyon v. Powell, 78 Ala. 351. *A court of equity has no jurisdiction to try the relative merits of legal titles held by adverse litigants in such a suit. Any holder of such a title, when brought in dispute, has a constitutional right to have its validity tried by a jury in an action of ejectment; and a court of law will furnish adequate remedy for testing the relative superiority of the claimants' respective titles:* Hambrick v. Russell, 86 Ala. 199. Said the court in Corning v. Smith, 6 N. Y. 82, per Foot, J.: 'I have consequently, sought earnestly and diligently for some authority to justify this court in holding that a court of chancery, on a bill for foreclosure, can entertain a question concerning a legal title between a third person and the mortgagor arising anterior to the giving of the mortgage, but can find none; and, on the contrary, all concur in upholding the rule stated by Chancellor Walworth in Eagle Fire Co. v. Lent, 6 Paige 637.' *There is no privity between an adverse claimant who is a stranger to the mortgage, and the estate*: Faubion v. Rogers, 66 Tex. 472. *It follows necessarily that as to the rights of such an adverse claimant a decree of foreclosure can have no effect whatever.*"

It will be noted that the author cites, in support of his conclusion, the cases of *Eagle Fire Co.* v. *Lent* and *Corning* v. *Smith*. We have shown above that these two New

York cases are based on the authority of *Lange* v. *Jones,* 5 Leigh (Va.) 192, which is predicated on the proposition that a court of equity has no jurisdiction in such cases. In Nebraska equity has no jurisdiction because of the constitutional and statutory provisions on the right to trial by jury. These constitutional and statutory provisions are in turn based on Chapter 29 of the Magna Charta, which says in part:

> "No freeman shall be * * * disseised from his freehold. * * * except by the legal judgment of his peers or the law of the land."

The complaint of the petitioners is that they were disseised of their freehold without a legal judgment of their peers—in disregard of the law of the land.

Point D.

No judgment without jurisdiction in the court is due process of law.

SPECIFICATION OF ERROR (2).

The trial court was without jurisdiction. The decree extinguishing the petitioners' title and providing for their eviction from the lands is not due process of law. *Scott* v. *McNeal,* 154 U. S. 34, 36, 38 L. Ed. 896, 902.

Point E.

A claimant in possession of real estate has a substantive right in the completed bar of the statute of limitations against suits for the recovery of such property. The arbitrary removal of the bar of the statute by the court is the same as arbitrarily taking the property from one person and subjecting it to the extinguished claim of

another and is inconsistent with constitutional provisions forbidding a deprivation of property withoout due process of law.

SPECIFICATION OF ERRORS (4) AND (5).

Section 20-202, Compiled Statutes of Nebraska, 1929, provides that actions for the recovery of the title and possession of lands or for the foreclosure of mortgages can only be brought within 10 years after the cause of action shall have accrued.

The petition showed that the action on the mortgage accrued June 7, 1928. The action for ejectment, if any, on account of the outstanding H. E. Erickson deed and bona fides of the respondent herein, accrued December 10, 1925. No matter was pleaded in the petition or in the replies tending to avoid the running of the statute. Petitioners duly pleaded the statute, as a defense.

As against the petitioners the action was commenced March 18, 1940, when the summons was issued and which was served upon them. *Miller* v. *McIntyre,* 6 Pet. (U. S.) 61, 8 L. Ed. 320; *Green* v. *Sanford,* 34 Neb. 363, 51 N. W. 967.

If there were any facts suspending or extending the bar of the statute it was necessary for the plaintiff to plead the same either in the petition or replies. This is the law in Nebraska. *Reed* v. *Barnes,* 113 Neb. 414, 203 N. W. 567. It has so been held in this court. *Piatt* v. *Vattier,* 9 Pet. 405, 9 L. Ed. 173; *Miller* v. *McIntyre,* supra.

The petitioners herein had a substantive right in the completed bar of the statute, *Stewart* v. *Keyes,* 295 U. S. 403, 417, 79 L. Ed. 1507, 1516.

The court below arbitrarily and capriciously set about to deprive the petitioners herein of their substantive rights by the interpolation of assumed facts, which the court deemed sufficient, if true, to toll the running of the statute (interpolation quoted under Specifications of Error (5), supra). In its opinion the court below pretended that this matter had been pleaded in the plaintiff's petition, so that on the face of the opinion, the conclusion of the court would not run counter to its holding in *Reed* v. *Barnes,* supra. The unlawful act is detected only by resort to the record and an examination of the contents of the plaintiff's petition to ascertain what is *not there.* The judgment of affirmance by the court below could not be sustained except on the assumption of fact that the interpolated matter had been pleaded in the plaintiff's petition and on the assumption of law that, if true, the matter tolled the running of the statute.

It is a judgment entered without a petition on file, or notice, or trial or hearing, or an opportunity to be heard in opposition to the truth of the matter supplied or its legal effect, if true. This is contrary to the cardinal precepts of due process of law. *Truax* v. *Corrigan,* 257 U. S. 312, 332, 66 L. Ed. 254, 263.

In *Stewart* v. *Keyes,* supra, this court held that where the right of action to recover property had been completely barred by the statute of limitations, the state, acting through the legislature, was without power to remove the bar of the statute by repeal, consistent with constitutional provisions forbidding a deprivation of property without due process of law. Of course, what a state may not do through one agency in disregard of the prohibitions of the 14th Amendment, it may do through

another. *Georgia Power Co.* v. *Decatur,* 281 U. S. 505, 74 L. Ed. 999, 50 Sup. Ct. Rep. 369.

Point F.

The court below sustained its judgment of affirmance on non-Federal grounds of decision that are clearly without any fair or substantial support and are plainly untenable.

The petitioners have shown:

A. The petition of the plaintiff is a sham and a nullity —designed only as a subterfuge to usurp the jurisdiction of a court of law. Nobody can be a proper party to a sham pleading.

B. The joinder of a cause of action at law against one group of defendants with an action in equity against another group, each group independent of the other, cannot be justified on the ground that a multiplicity of suits may be thereby avoided. Such justification found in the opinion is obviously and authoritatively untenable. *Warlier* v. *Williams,* supra.

C. The finding of the court below that the trial court had jurisdiction to render a decree affecting the rights of the petitioners is refuted by the self-same authority upon which the conclusion is based. Note 68 Am. St. Rep. 356.

D. Petitioners were disseised of their freehold by a court without jurisdiction—without a legal judgment of their peers in disregard of the law of the land.

E. The petitioners were deprived of their property by a falsification of the facts to fit an arbitrary and capricious conclusion.

Point G.

The only method, under the statute and the rules of the Supreme Court of Nebraska to claim a title, right, privilege or immunity under the Federal Constitution, denied by the inferior court, is in the brief of the appellant prepared as provided by the rules of the court.

Section 25, Article V of the Constitution of Nebraska, provides as follows:

> "For the effectual administration of justice and the prompt disposition of judicial proceedings, the Supreme Court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters. To the same end, the court may, and when requested by the Legislature by joint resolution, shall certify to the Legislature, its conclusion as to desirable amendments or changes in the general laws governing such practice and proceedings."

Section 20-1919, 1929 Compiled Statutes of Nebraska, provides as follows:

> "BRIEFS IN SUPREME COURT, GENERAL RULE, WHAT APPELLANT'S BRIEF MUST SET OUT, PLAIN ERRORS CONSIDERED.
>
> "The Supreme Court shall by general rule provide for the filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; but no petition in error or other assignment of errors shall be required beyond or in addition to the foregoing requirement. The Supreme Court, may, however, at its option, consider a plain error not specified in appellant's brief."

Section 27-210, supra, provides as follows:

> "The judges of the Supreme Court shall during the month of January in the year 1913 and each second year thereafter revise the general rules of said court and adopt such additional rules as may be deemed necessary or appropriate for the dispatch of business before said court including rules for the advancement of pending causes."

Under this authority the Supreme Court adopted the Revised Rules of the Supreme Court of the State of Nebraska, which were in force in 1942, in which Rule 14 a is as follows:

> "a. Appellant's Brief—The brief of appellant shall consist of the statement of the case, the substance of such parts of the record relied upon, and the argument of counsel.
>
> "1. The statement of the case shall consist of:
>
> "(a) The kind of action or nature of the case.
>
> "(b) The issues actually tried in the court below.
>
> "(c) How the issues were decided and what the judgment or decree of the trial court was.
>
> "(d) The errors relied upon for reversal, separately numbered.
>
> "(e) The propositions of law relied upon as necessarily involved in the decisions of the case. Each proposition must be numbered and separately stated in heavier type, concisely and without argument or elaboration, and authorities relied upon as supporting them must be cited with each proposition respectively.
>
> "Note: No case should be cited in the propositions of law that is not quoted from or otherwise discussed in the argument in the brief."

Point H.

The writ of certiorari should be granted; the case heard on its merits and the judgment of the court below reversed.

The opinion filed by the court below, when read in the light of the record of the case, the constitutional and statutory laws of Nebraska, and the previous decisions of the State Court construing and applying such laws, clearly demonstrates that the petitioners herein were intentionally discriminated against, denied their plain constitutional and statutory rights, deprived of their property without due process of law. A gross denial of justice was intended and consummated.

It is the constitutional duty of this court to be vigilant to detect and turn aside any attempt to substitute the mere will of an official or an official body for a standing law as a rule of human conduct, and to resist even petty encroachments upon the fundamental rights, privileges and immunities of the people. *Jones* v. *Securities Exchange Comm.*, 298 U. S. 1, 24, 80 L. Ed. 1015, 1025; *Byars* v. *United States*, 273 U. S. 28, 32, 71 L. Ed. 520, 523; *Boyd* v. *United States*, 116 U. S. 616, 635, 29 L. Ed. 746, 752; 6 Sup. Ct. Rep. 520; *Gouled* v. *United States*, 255 U. S. 298, 304, 65 L. Ed. 647, 650.

It is the duty of this court to protect and maintain the supremacy of the Constitution of the United States. *Ward* v. *Love*, 253 U. S. 17, 32, 64 L. Ed. 751, 758.

If a state by any of its agencies disregards the prohibitions of the 14th Amendment, it is the duty of this court to pass upon the merits of petitioner's claim. *Georgia Power Co.* v. *Decatur*, 218 U. S. 505, 508, 74

L. Ed. 999, 1003; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 234, 41 L. Ed. 979, 983; *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 36, 52 L. Ed. 78, 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757.

Where the issues of law are made on the facts alleged in the petition, in determining their legal effect as a deprivation of legal rights under the 14th Amendment, this court is at as full liberty to consider them as was the State Supreme Court. *Traux* v. *Corrigan,* 257 U. S. 312, 324, 66 L. Ed. 254, 259.

We respectfully submit that, under the foregoing cited authorities, this court should pass upon the merits of petitioners' claim.

On the merits of the case, under Points A, B, C, D, and E, supra, we have shown beyond question, that the State of Nebaska, acting through its Supreme Court, has divested petitioner William Niklaus, and those claiming under him, of the fee simple title and possession of 623 acres of valuable land by the final judgment of affirmmance of a decree entered on a petition that was and is a nullity, by a court without jurisdiction of the subject matter, on a claim already extinguished by the statute of limitations and for which petitioners were in no way responsible; that petitioners were denied the equal protection of constitutional and statutory laws established for the security of their fundamental private rights; were arbitrarily and capriciously condemned to the loss of their property by an original judgment of the Supreme Court of Nebraska, disguised as a judgment of affirmance, on a fictitious statement of facts arbitrarily framed by the court and supplied on its own motion, without notice, trial or hearing, or an opportunity to be heard in opposition thereto.

Such disregard of the fundamental and inherent rights of the petitioners is repugnant to and in violation of the prohibitions of the 14th Amendment of the Constitution of the United States. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 680, 74 L. Ed. 1107, 1113, 50 Sup. Ct. Rep. 451; *Boyd* v. *United States, Byars* v. *United States, Chicago, B. & Q. R. Co.* v. *Chicago*, supra; *Ex parte Commonwealth* v. *Virginia*, 100 U. S. 339, 25 L. Ed. 676, 679; *Gouled* v. *United States, Jones* v. *Securities Exchange Comm.*, supra; *Neal* v. *Delaware*, 103 U. S. 370, 26 L. Ed. 567, 574; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565; *Georgia Power Co.* v. *Decatur, Raymond* v. *Chicago Union Tract*, supra; *Scott* v. *McNeal*, 154 U. S. 34, 36, 38 L. Ed. 896, 902; *Steward* v. *Keyes*, 295 U. S. 403, 417, 79 L. Ed. 1507, 1516; *Traux* v. *Corrigan, Ward* v. *Love*, supra; *Yickwo* v. *Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Broad B. P. Co.* v. *So. Carolina, ex rel. Daniel*, 281 U. S. 537, 540, 74 L. Ed. 1023, 1030, 50 Sup. Ct. Rep. 401; *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 282, 76 L. Ed. 1102, 1106-7; *Norris* v. *Alabama*, 294 U. S. 587, 590, 79 L. Ed. 1074, 1077; *Roberts* v. *New York*, 295 U. S. 264, 277, 79 L. Ed. 1429, 1435; *Brown* v. *Mississippi*, 297 U. S. 278, 286, 80 L. Ed. 682, 687; *Missouri, ex rel. Gaines* v. *Canada*, 305 U. S. 337, 350, 83 L. Ed. 208, 213; *Home Tel & Telg. Co.* v. *Los Angeles*, 227 U. S. 278, 288, 57 L. Ed. 510, 515.

CONCLUSION.

The facts material to the matters of law involved in the application herein are simple, undisputed and are found on the pages of the plaintiff's petition.

The claims of petitioners for protection under the 14th Amendment of the Federal Constitution, as adverse

claimants in possession of real estate, is made in their answers filed in the trial court and insisted upon throughout the proceedings.

The petition of the plaintiff in the trial court, as one to initiate litigation on the merits of legal titles to real estate and for ejectment, is, unquestionably, a nullity.

The court in which the petition was filed was and is without jurisdiction to entertain it. The trial court's decree of ejectment is void on either one or both grounds.

The claims or causes of action that could arise from the facts alleged were all extinguished by the lapse of time before the petition was filed and so appearing on the face thereof. This proposition was conceded by the court below through its action in supplying the facts deemed necessary to arrest the running of the statute of limitations.

The conclusion is irresistable that petitioners were denied the equal protection of the Constitution and Statutes of Nebraska, deprived of their property by a void judgment on an extinguished claim.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of the State of Nebraska to the end that the judgment of the Supreme Court of Nebraska may be reviewed and reversed by this Honorable Court.

WILLIAM NIKLAUS,
MARY NIKLAUS, and
LOUP RIVER PUBLIC POWER DISTRICT,

By WILLIAM NIKLAUS, *Pro se.*
HERBERT W. BAIRD,
Counsel for Petitioners.

APPENDIX.

Section 3, Article I, Nebraska Constitution. *Due Process of Law.* No person shall be deprived of life, liberty, or property, without due process of law.

Section 6, Article I, Nebraska Constitution. *Trial by Jury.* The right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than twelve in courts inferior to the district court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury.

Section 20-1104, Compiled Statutes Neb. 1929. *Issues, How Tried.* Issues of law must be tried by the court, unless referred as provided in section three hundred and eight (20-1139) of this code. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury unless a jury trial is waived or a reference be ordered as hereinafter provided.

Section 20-202, Compiled Statutes Neb. 1929. *Recovery of Title or Possession of Real Estate, When Accrues, Mortgage Foreclosures, Streets, Roads and Public Grounds By County or Municipal Corporation.* An action for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of action shall have accrued: Provided, no limitation shall apply to the time within which any county, city, town or village or other municipal corporation may begin an action for the recovery of the title or possession of any public road, street, alley or other pub-

lic grounds or city or town lots. For the purposes of this act, a cause of action for the foreclosure of a mortgage shall be deemed to have accrued at the last date of the maturity of the debt or other obligation secured thereby, as stated in, or as ascertainable from the record of such mortgage or in an extension thereof duly executed and recorded, and if no date for any maturity be stated therein or be ascertainable therefrom, then not later than twenty years from the date of said mortgage; Provided, however, if the mortgage creditor shall, before the mortgage is barred under the provisions of this act, refile in the recorder's office the mortgage, or a sworn copy thereof for record, then said cause of action shall not be barred until the expiration of ten years from the date of said refiling; Provided further, that the time within which an action may be brought upon a mortgage having no date of maturity stated therein shall not be more than ten years from the maturity of the debt secured thereby. At the expiration of ten years from the date the cause of action accrues on any mortgage as is herein provided, such mortgage shall be presumed to have been paid, and the mortgage and the record thereof shall cease to be notice of the mortgage as unpaid and the lien thereof shall then cease absolutely as to subsequent purchasers and encumbrancers for value; said period of ten years shall not be extended by non-residence, legal disability, partial payment, or acknowledgement of debt. No action for the recovery of the title or possession of lands, tenements or hereditaments; or for the foreclosure of a mortgage thereon shall be begun after one year from the passage of this act by any person whose right of action would be otherwise barred hereby, unless within such year, the holder of an existing mortgage which would otherwise be barred hereby shall file for record a duly

executed extension of such mortgage and such period of one year shall not be extended by non-residence or legal disability.

Section 344 (b) Title 28 U. S. C. A.

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privileges, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

Section 350, 1st paragraph, Title 28 U. S. C. A.

Time for making application for writ of error, appeal, or certiorari; stay pending application for certiorari. No writ of error, appeal, or writ of certiorari, intended to

bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court.

Article XIV, Section 1, Amendment to U. S. Constitution.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(32)

No. 390

In The

SUPREME COURT OF THE UNITED STATES

WILLIAM NIKLAUS, MARY V. NIKLAUS AND LOUP RIVER PUBLIC POWER DISTRICT, A CORPORATION, PETITIONERS,

V.

THE LINCOLN JOINT STOCK LAND BANK OF LINCOLN, NEBRASKA, A CORPORATION, RESPONDENT.

ANSWER BRIEF OF RESPONDENT.

C. A. SORENSEN,
Counsel for Respondent.

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In The

SUPREME COURT OF THE UNITED STATES

WILLIAM NIKLAUS, MARY V. NIKLAUS AND LOUP RIVER PUBLIC POWER DISTRICT, A CORPORATION, PETITIONERS,

V.

THE LINCOLN JOINT STOCK LAND BANK, OF LINCOLN, NEBRASKA, A CORPORATION, RESPONDENT.

ANSWER BRIEF OF RESPONDENT.

C. A. SORENSEN,
Counsel for Respondent.

STATEMENT OF CASE.

This is a suit in equity brought by the respondent in the District Court of Lancaster County, Nebraska, to foreclose a real estate mortgage (Trans. pp. 15-29).

Trial was had on the second amended and supplemental petition of this respondent (plaintiff in said cause), the answers of the petitioners in this court and

others (defendants in said cause), the replies of the respondent to said answers, and the evidence (Trans. pp. 46-47). The trial court in the decree of foreclosure found and determined that it had jurisdiction of the parties and of the subject matter of the action; found generally for the respondent and against the petitioners, and found that the allegations of respondent's petition were true (Trans. p. 47). In addition, the trial court found that the mortgage being foreclosed had been duly executed and delivered to the respondent to secure loan to mortgagor, one Lafayette P. Barnes, of $35,000 by the respondent; that the mortgage was duly filed for record and recorded November 22, 1922; that at the time of the execution, delivery and filing for record of the mortgage, the mortgagor was the owner of land mortgaged; that the mortgage was a first lien thereon; that there was due to the respondent $76,477.08, which sum the mortgage was given to secure; that the respondent was entitled to a foreclosure of the mortgage for the satisfaction of the amount found due, and that "any right, title or interest of the defendants, William Niklaus, Mary V. Niklaus, Loup River Public Power District, a corporation, and the other defendants, if any, in and to said premises, are inferior and subject to the lien of said mortgage" (Trans. pp. 47-48).

On appeal to the Supreme Court of Nebraska the decree and judgment of the trial court was affirmed (Trans. pp. 57-66). The respondents filed motion for rehearing (Trans. pp. 66-70) which was denied (Trans. p. 70).

The appeal to the Supreme Court of Nebraska was taken without the submission of bill of exceptions to that court (Trans. p. 59).

There was before the Supreme Court of Nebraska the trial court's findings of fact and conclusions of law pursuant to which the decree of foreclosure was entered (Trans. pp. 59-60). The petitioners, however, have failed to include within the transcript of record, filed in this court, said findings of fact and conclusions of law.

In their petition for writ of certiorari and supporting brief, counsel for petitioners make numerous misleading, and some false, statements as to what the transcript of record shows. Among other things, counsel for petitioners assume to be true allegations in the answers of the petitioners to respondent's foreclosure petition which are denied in the replies of the respondent thereto. Attention is directed to the following inaccuracies and omissions:

1. On page 2 of petitioners' petition and brief, under the heading of "The Material Facts," it is stated as a fact that petitioner William Niklaus acquired legal title to a tract of land by deed from Amanda J. Erickson and Paul W. Erickson, whose "grantors acquired title by descent from H. E. Erickson, who acquired title by warranty deed, under date of February 8, 1916, from Lafayette P. Barnes, deed recorded December 10, 1925."

In support of this statement, counsel for petitioners refer to paragraph 20 of respondent's foreclosure petition in which the respondent alleges only that on December 10, 1925, there was filed for record and recorded an instrument "*purporting* to be executed by the defendants Lafayette P. Barnes and Lottie M. Barnes, his wife, and to convey to one H. E. Erickson" a part only of the real estate involved in the foreclosure action; that

Amanda J. Erickson and Paul W. Erickson were heirs at law of said H. E. Erickson; that on April 14, 1938, there was filed for record and recorded a quit claim deed executed by Amanda J. Erickson, Paul W. Erickson and Ann Louise Erickson *purporting* to convey to William Niklaus the real estate in question; that "William Niklaus claims to have some interest in or lien upon said real estate, or right of redemption from sale, the exact nature of which is unknown to the plaintiff, and is, or claims to be, in possession of said real estate," and that "whatever interest, if any, the defendants Amanda J. Erickson, Paul W. Erickson, Ann Louise Erickson, and William Niklaus, or either of them, have in and to said real estate is subject, junior, and inferior to the lien of the plaintiff and the legal and equitable rights thereunto appertaining" (Trans. p. 27).

2. On page 3 of petitioners' petition and brief, it is stated that "William Niklaus entered into peaceful possession of the lands immediately after he acquired title and was in the actual, continuous possession thereof at all times since until he was evicted by a writ of assistance in manner and form hereinafter shown."

In support of this statement no reference to the transcript of record is made and nowhere therein does it appear that the petitioner William Niklaus was ever evicted from any real estate.

3. On page 3 of petitioners' petition and brief, it is also stated that "The respondent claims title to the same lands" by virtue of a mortgage from Lafayette P. Barnes and "through the quit claim deed by Frank Rutherford." The citations do not sustain the allegations; the respondent does not claim title through Barnes or Rutherford.

4. On page 5 of petitioners' petition and brief, it is stated that "The petition which petitioners were summoned into court to answer was abandoned by the filing of another or substituted petition, under date of July 18, 1940."

The citation does not sustain the allegation; on its face and by its language the petition filed by the respondent, on July 18, 1940, was an "amended and supplemental petition" (Trans. p. 15).

5. On page 9 of petitioners' petition and brief, it is stated that "On the issue of the statute of limitations the case was submitted to the court below on the facts appearing on the face of the plaintiff's petition and the plea of the statute of limitations contained in the petitioner's answers."

The record only shows that the question of the statute of limitations was raised in the answers; not how the issue was submitted. Replies were filed to the answers of the petitioners denying all allegations therein made (Trans. pp. 45-46) and the decree of the trial court was based on the pleadings *and the evidence* (Trans. p. 46).

6. On pages 9 and 10 of petitioners' petition and brief, it is stated that "At some time after the case was argued and submitted in the appellate court and the date of the order of affirmance and without notice to the petitioners and without an opportunity to be heard thereon, the court below, on its own motion, interpolated in the case the following facts: 'From March 9, 1929, until sometime in 1938 the appellee herein (respondent) was restrained and enjoined by the federal court from

proceeding further and the trustee of said court during that period was in possession of the premises.' " On page 11 the petitioners assert that the Supreme Court of Nebraska decided "the issue on the statute of limitations on the basis of supplied facts."

The citations to the transcript of the record given by counsel for the petitioners do not show that the Supreme Court of Nebraska "interpolated" or "supplied" any facts. That court had before it for its use the findings of fact of the trial court (Trans. pp. 59-60).

7. On pages 16 and 17 of petitioners' petition and brief, under heading entitled "The Facts," it is stated that "The Facts giving rise to the issues of law herein discussed are not in dispute and are found in the petition upon which the case was tried * * *." Counsel for petitioners then proceeds to set forth as facts admitted by the respondent that on February 8, 1916, Lafayette P. Barnes transferred the title to the real estate in question to H. E. Erickson; that in 1932 Erickson died "while the owner of the lands;" that Amanda J. Erickson and Paul W. Erickson transferred the title to William Niklaus; that Niklaus entered into peaceful possession of said lands; and that on August 29, 1922, Lafayette P. Barnes, "acting in fraud of the rights of H. E. Erickson and in disregard of the covenants of warranty of his deed of February 8, 1916, executed a mortgage on the same lands to the respondent herein under such circumstances as to raise the inference that respondent was implicated in the fraud."

As to most of these statements no citations to the transcript of record are given, and those given do not support the allegations.

8. On page 18 of petitioners' petition and brief, it is stated that on June 7, 1928, the respondent commenced an action to foreclose its mortgage against Frank Rutherford and others and that while the suit was pending the respondent acquired title to the mortgagor's equity of redemption and "discontinued the pending suit."

There is nothing in the transcript of record to show that the respondent ever commenced a foreclosure action against Frank Rutherford or that the foreclosure case was ever discontinued. As to the quit claim deed obtained by the respondent from Frank Rutherford and his wife, the respondent in its foreclosure petition alleges that in acquiring the same it did not intend or elect that its rights as mortgage lien holder should in any manner be affected by merger or otherwise, and in acquiring said title the plaintiff expressly reserved and asserted all its rights as the owner and holder of said mortgage deeds without merger of the same in said title" (Trans. pp. 25-26).

9. On page 18 of petitioners' petition and brief it is stated that the respondent "admits knowledge of the ownership of the lands in H. E. Erickson and his successors in title as early as December 10, 1925." The record does not show that the respondent ever made any such admission of ownership. On the contrary, the respondent alleges in its foreclosure petition that said H. E. Erickson filed a petition in the District Court of Lancaster County, Nebraska, in 1927, in which he asserted that a person other than himself was the owner of the real estate in question (Trans. pp. 27-28).

ARGUMENT.

In this cause the record before the Supreme Court of Nebraska did not contain a bill of exceptions (Trans. p. 59). In its absence the Supreme Court could only determine whether the pleadings sustain the judgment rendered thereon. *Wheeler* v. *Boiler,* 129 Neb. 792, 263 N. W. 123. In such case it will be presumed that all issues of fact raised by the pleadings received support from the evidence and that such issues were correctly determined. *Prokop* v. *Mlady,* 136 Neb. 644, 287 N. W. 55; *Backes* v. *Schlick,* 82 Neb. 289, 117 N. W. 707. From an examination of the second amended and supplemental petition of the respondent, upon which the foreclosure case was tried, the Supreme Court found that it sustained "the findings of fact of the lower court and the decree entered thereon" (Trans p. 60).

The transcript of record filed in this court does not contain the findings of fact and conclusions of law of the trial court which were before the Supreme Court of Nebraska for its use. And, as has been pointed out, the statement of the case by counsel for the petitioners is in many particulars inaccurate and in some instances false. It is replete with innuendoes and conclusions not supported by the record. The bald assertion that the Supreme Court of Nebraska "modified the facts, dehors the record and upon the changed record entered its order of affirmance" (petition for writ and brief, pp. 21-22) is not supported by the record before this court, is malicious, utterly unwarranted, and constitutes contempt of, and an insult to, the Chief Justice and the judges of the Supreme Court of Nebraska.

The petitioners complain of many things, lack of jurisdiction of the equity trial court to try the case, misjoinder of parties and of causes of action, deprivation of trial by jury, merger of mortgagor's title in the mortgagee, and failure of the Supreme Court of Nebraska to recognize the running of the statute of limitations. Throughout the petition and supporting brief the petitioners ignore the fact that the respondent seeks equitable relief only, [redacted] the establishment of a lien and the foreclosure thereof. It is not an action for the recovery of real property or of money. All that the respondent asks is that the land be sold and out of the proceeds there be taken an amount sufficient to liquidate the respondent's lien on the land (Trans. p. 28). The balance of the proceeds, if any, will go to the owners of the equity of redemption. If the H. E. Erickson deed is valid, subject only to respondent's mortgage, said Niklaus has an equity of redemption. The petitioners were made defendants for the sole purpose of establishing their rights in relation to respondent's mortgage and adjusting claimed priorities. All that respondent alleges in its petition with respect to petitioners is that any right, title or interest which they may have in the lands are inferior and subject to the lien of the mortgage (Trans. p. 27).

The petitioners appear to rely on two propositions, first, that they were wrongfully deprived of a jury trial, and second, that the respondent's right to foreclose the mortgage was barred by the statute of limitations.

I. The Supreme Court of Nebraska Did Not Err in Holding That Respondent's Right to Foreclose Mortgage Was Not Barred by the Statute of Limitations.

Respondent's original foreclosure petition was filed on June 8, 1928 (Trans. pp. 24-25); amended and supplemental petition was filed March 18, 1940 (Trans. p. 1), and second amended and supplemental petition, on which decree and judgment was rendered, was filed July 18, 1940 (Trans. p. 15). The Supreme Court of Nebraska found that the cause of action set forth in the original petition and in the second amended and supplemental petition upon which the case was tried, were the same, and that the second amended and supplemental petition did not introduce a new cause of action, the cause of action in both petitions being for the purpose of foreclosing the same mortgage on the same premises (Trans. pp. 65-66).

As alleged by counsel for petitioners, the cause of action accrued on June 7, 1928 (Trans. p. 24). The suit to foreclose the mortgage was brought the next day (Trans. pp. 24-25) and is still pending. The Supreme Court of Nebraska found that the bringing in of additional parties defendant was necessary and proper by reason of the death of H. E. Erickson and subsequent conveyances from his heirs and successors in title (Trans. pp. 65-66). Section 20-856, Compiled Statutes of Nebraska for 1929, referred to by the court, reads as follows:

> "Either party may be allowed on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply alleging facts material to the case, *occurring after the former petition*, answer or reply."

In *Kennedy* v. *Potts,* 128 Neb. 213, 258 N. W. 471, an action for foreclosure of a tax lien, the Supreme Court of Nebraska said:

> "It is a rule that, where an action is commenced before the cause of action is barred by the statute of limitations, but subsequent to the running of the statute an amended petition is filed, in which the allegations of the petition are amplified, and there is no change in the cause of action, filing of such amended petition does not affect the plaintiff's right of recovery."

Upon the amendment of a petition, where, as in the case at bar, the identity of the cause of action is preserved, and the claim of the plaintiff not substantially changed, the action will be held as commenced on the date of the filing of the original petition and service of summons therein. *Schuyler National Bank* v. *Bollong,* 28 Neb. 684, 45 N. W. 164; *Davis* v. *Manning,* 97 Neb. 658, 150 N. W. 1019, and *Norfolk Beet Sugar Co.* v. *Haight,* 59 Neb. 100, 80 N. W. 276.

Petitioner William Niklaus alleges that he became the owner of the premises April 13, 1938 (Trans. p. 35). He was served with summons in the foreclosure action on March 21, 1940 (Trans. p. 8). He therefore in no event could have been in possession of the premises for more than two years prior to being made a party to the foreclosure suit.

After the death of H. E. Erickson, one of the defendants in the foreclosure suit, the trial court on March 18, 1940, revived the action against Amanda J. Erickson and Paul W. Erickson as heirs and devisees of H. E. Erickson and they became parties to the suit and filed answers (Trans.

pp. 60, 46). As to the possession of the real estate in question, the respondent alleges in its foreclosure petition that "neither said H. E. Erickson nor the defendants Amanda J. Erickson and Paul W. Erickson, or either of them, were ever at any time in actual, open, adverse and hostile possession of said real estate, or any part thereof" (Trans. p. 28). The respondent further alleges that on September 12, 1927, said H. E. Erickson filed a petition in the District Court of Lancaster County, Nebraska, alleging that the title to said real estate was in Lafayette P. Barnes and therefore not in himself (Trans. p. 28). This was more than two years after the purported deed from Lafayette P. Barnes to H. E. Erickson was filed for record (Trans. p. 27).

It does not appear from the transcript of record what allegations, if any, as to possession of the premises were made by the defendants Amanda J. Erickson and Paul W. Erickson in their respective answers filed in the foreclosure suit. But the petitioners asserted in their answers that William Niklaus and his grantors, Amanda J. Erickson and Paul W. Erickson, were in possession of the real estate for more than ten years prior to March 18, 1940 (Trans. pp. 33, 34, 40, 41). To these answers the respondent filed replies denying all allegations therein contained except those which admitted allegations of the respondent's petition (Trans. pp. 45-46). The issues of fact thereby raised were determined by the trial court in favor of the respondent. In the absence of a bill of exceptions, the Supreme Court of Nebraska was ~~found~~ bound to assume that these issues of fact were correctly determined by the trial court.

II. The Supreme Court of Nebraska Did Not Err in Refusing to Hold That the Petitioners Were Entitled to a Jury Trial.

Section 6 of Article I of the Constitution of Nebraska, respecting right to trial by jury, is only "a constitutional guaranty that the right of trial by jury shall remain as it did prior to the adoption of the constitution of 1875." *Kuhl* v. *Pierce County*, 44 Neb. 584, 62 N. W. 1066; *City of Mitchell* v. *Western Public Service Company*, 124 Neb. 248, 246 N. W. 484; *In re Warner's Estate*, 137 Neb. 25, 288 N. W. 39.

In Nebraska a suit to foreclose a mortgage is an action in equity and for equitable relief. *Macumber* v. *Thomas*, 114 Neb. 290, 207 N. W. 31.

In the foreclosure action at bar the respondent sought equitable relief alone. The petitioners interposed alleged legal defenses. Under the rule in Nebraska this did not secure for them a right to trial by jury. Said the Supreme Court of Nebraska in *Daniels* v. *Mutual Benefit Insurance Co.*, 73 Neb. 257, 102 N. W. 458, a mortgage foreclosure suit:

> "The next question urged is that the court erred in overruling the demand of plaintiffs in error for a trial by jury on the question of their liability for a deficiency judgment. *The determination of this question depends on the nature of the action at its inception. If purely equitable, the right of trial by jury did not exist;* if legal in its nature at its inception, although equitable defenses might be interposed, the right of trial by jury would still remain. Schumacher v. Crane-Churchill Co., (Neb.) 92 N. W. 609. *But where the action as originally instituted seeks equitable relief alone, the interposi-*

> *tion of a legal defense does not secure for the defendant a right to a trial by jury of the legal defenses pleaded.* Albin v. Parmele, (Neb.) 99 N. W. 646; Sharmer v. McIntosh, 43 Neb. 509, 61 N. W. 727; Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383. The action to foreclose the real estate mortgage being purely equitable in its inception, the right to a trial by jury did not arise on defendant's answer to the motion for a deficiency judgment."

It is a general rule that, where a court in the exercise of its equity powers acquires jurisdiction for any purpose, its jurisdiction will continue for all purposes, and it will try all issues. *Parsons Construction Co.* v. *Gifford,* 129 Neb. 617, 262 N. W. 508; *Provident Savings & Loan Ass'n.* v. *Booth,* 138 Neb. 424, 293 N. W. 293, and *Johnson* v. *Weskamp,* 122 Neb. 381, 240 N. W. 514. So in Nebraska "A court of equity has power to determine controverted issues involving the priority of specific liens on real estate." *Shafer* v. *Wilsonville Elevator Company,* 121 Neb. 280, 237 N. W. 155.

Section 9 of Article V of the Constitution of Nebraska, provides that "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide * * *." In construing this section the Supreme Court of Nebraska has held repeatedly that the equity jurisdiction vested in the district courts is exercisable without legislative enactment and is beyond the legislature's power to limit or control. *Burnham* v. *Bennison,* 121 Neb. 291, 236 N. W. 745; *State* v. *Farmers State Bank of Polk,* 121 Neb. 532, 237 N. W. 857, and *State* v. *Nebraska State Bank of Bloomfield,* 124 Neb. 449, 247 N. W. 31.

Even if it were conceded for purpose of argument that the answers of the petitioners in the foreclosure action presented issues triable to a jury, under the practice in Nebraska they waived their right to a jury trial by not filing application to transfer the case to law docket. In no event was the jurisdiction of the court to try the case defeated. *Globe* v. *Swobe*, 64 Neb. 838, 90 N. W. 919; *Krumm* v. *Pillard*, 104 Neb. 335, 177 N. W. 171.

In *Southern R. Co.* v. *Durham*, 266 U. S. 178, the Supreme Court of the United States said:

> "Denial of jury trial in mandamus action by city to compel railroads to eliminate grade crossings is not violative of the Fourteenth Amendment; neither the federal laws nor Constitution giving a right to trial by jury when local statutes and practice prescribe otherwise.
>
> "Determination of the state Supreme Court that respondents in mandamus to compel railroads to eliminate grade crossings are not entitled to jury trial will be accepted by the federal Supreme Court as a correct determination of the local law."

The highest state court is the final authority on state law and has the last word on the construction and meaning of state constitution and statutes. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Vandenbark* v. *Owens-Illinois Glass Company*, 311 U. S. 538; *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223; *State of Minnesota, ex rel. Pearson* v. *Probate Court of Ramsey County*, 309 U. S. 270; *Kersh Lake Drainage District of Jefferson, Lincoln and Desha Counties* v. *Johnson*, 309 U. S. 485; *Neblett* v. *Carpenter*, 305 U. S. 297.

Obviously, this is not a case "where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court" (Rule 38).

Where a decision is supported on adequate state grounds, as in this case, it is unnecessary to consider objections made to it on alleged federal constitutional grounds. *Susquehanna Power Co.* v. *Maryland Tax Commission,* 283 U. S. 291; *Fox Film Corporation* v. *Muller,* 296 U. S. 207. It is also the rule that even if the decision of the state court ~~was~~ were erroneous, if based on non-federal grounds, the Supreme Court of the United States lacks jurisdiction. *Brinkerhoff-Farris T. & S. Co.* v. *Hill,* 281 U. S. 673; *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292.

CONCLUSION.

Since no federal question was determined by the state court and its decision was based wholly on non-federal grounds adequate to support it (Trans. pp. 58-66), it is respectfully suggested that the petition for writ of certiorari should not be granted. *George O. Richardson Machinery Co.* v. *Scott,* 276 U. S. 128; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U. S. 157; *Utley* v. *City of St. Petersburg, Fla.,* 292 U. S. 106; *Susquehanna Power Co.* v. *Maryland Tax Commission,* 283 U. S. 291; *U. S.* v. *Hastings,* 296 U. S. 188; *Honeyman* v. *Hanan,* 300 U. S. 14.

Respectfully submitted,

C. A. SORENSEN,
Counsel for Respondent, The Lincoln Joint Stock Land Bank of Lincoln, Nebraska.

No. 390

In The

SUPREME COURT OF THE UNITED STATES

WILLIAM NIKLAUS, MARY V. NIKLAUS AND LOUP RIVER PUBLIC POWER DISTRICT, A CORPORATION, PETITIONERS,

V.

THE LINCOLN JOINT STOCK LAND BANK, OF LINCOLN, NEBRASKA, A CORPORATION, RESPONDENT.

PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI, AND SUPPORTING BRIEF

HERBERT W. BAIRD,
Counsel for Petitioners.

WEKESSER PUBLISHING CO., Law Briefs, Lincoln, Nebr.

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HERBERT W. BAIRD,
Counsel for Petitioners.

PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petition of William Niklaus, Mary V. Niklaus and Loup River Public Power District respectfully shows:

Petitioners seek a rehearing or reconsideration of the order of this court entered on the 8th day of November, 1943, denying petitioners writ of certiori to the Supreme Court of Nebraska, for the following reasons, to-wit:

1. The petition for writ of certiorari herein shows that the State of Nebraska, acting through its judiciary, has disregarded the prohibitions of the 14th Amendment of the Constitution of the United States in two particulars, to-wit:

(a) Has deprived the petitioners of their property by a judgment made by a court without jurisdiction.

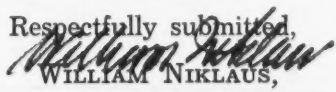
(b) Has deprived the petitioners of their property and applied the same on the extinguished claim of the respondent.

Under such circumstances this court is required to grant the writ and pass upon the merits of petitioners' claim.

The authorities in support of this petition are cited and discussed in a supporting brief hereto attached.

Wherefore your petitioners pray that this Honorable Court reconsider the petition for writ of certiorari, revoke the order denying the same, grant the writ as prayed in the petition to the end that the judgment of the Supreme Court of Nebraska may be reviewed and reversed by this Honorable Court.

Respectfully submitted,



WILLIAM NIKLAUS,
MARY V. NIKLAUS,
LOUP RIVER PUBLIC POWER DISTRICT,

By HERBERT W. BAIRD,
Their Attorney.

SUPPORTING BRIEF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

STATEMENT OF THE CASE.

Petitioners submit the within brief in support of their petition seeking a rehearing or reconsideration and revocation of the order of this court denying petitioners writ of certiorari to the Supreme Court of Nebraska, said order entered November 8, 1943.

The case is stated in the supporting brief attached to the petition for writ of certiorari.

ARGUMENT.

Point A

Where a State by Any of Its Agencies Disregards the Prohibitions of the 14th Amendment, This Court, Upon Petition for Writ of Certiorari, is Required to Pass Upon the Merits of Petitioners' Claim.

Under Points A, B. C, and D of the supporting brief, petitioners have shown that they were deprived of their property through and by virtue of a judgment made by a court without jurisdiction. In *Scott* v. *McNeal,* 154 U. S. 34, 36, 38 L. Ed. 896, 902, this court held that a judgment without jurisdiction in the court is not due process of law.

Under Point E of the supporting brief, petitioners have shown that the court below arbitrarily and capriciously deprived the petitioners of their property and appropri-

ated the same to the extinguished claim of the respondent.

In *Stewart* v. *Keyes*, 295 U. S. 403, 417, 79 L. Ed. 1507, 1516, this court held that the owner of land has a substantive right in the completed bar of the statute of limitation against claims for the recovery of the land. In the opinion this court said:

> "As respects suits to recover real or personal property where the right of action is barred by the statute of limitations and a later act has attempted to repeal or remove the bar after it had become complete, the rule sustained by reason and preponderant authority is that the removing act cannot be given effect consistently with constitutional provisions forbidding a deprivation of property without due process of law. 'The reason is,' as this court has said, 'That by the law in existence before the repealing act the property had become defendants. Both the legal title and the real ownership had become vested in him and to give the act the effect of transferring this title would be to deprive him of his property without due process of law.' "

The only distinction between the above cited case and the case at bar is that in the latter the judiciary attempted to remove the bar of the statute by interpolation of facts dehors the record. While in the former the attempt was made by the legislature.

In both cases the state through its agency disregarded the prohibitions of the 14th Amendment.

In the case of *Georgia Power Co.* v. *Decatur*, 281 U. S. 505, 508, 74 L. Ed. 999, 1003, this court said:

> "The state may not by any of its agencies disregard the prohibitions of the 14th amendment. * * * *We are therefore required to pass upon the merits of petitioners' claim.*"

In the case of *Ward* v. *Love*, 253 U. S. 17, 22, 64 L. Ed. 751, 758, this court said with reference to a right claimed under the 14th Amendment and denied by the state court of last resort:

> "The county challenges our jurisdiction by motion to dismiss the Writ of Certiorari, and by way of supporting the motion insists that the Supreme Court put its judgment entirely on independent non-Federal grounds which were broad enough to sustain the judgment. - - - Whether the right was denied, or not given due recognition, by the Supreme Court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. *It is therefore within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support.*"

Point B

It is the Constitutional Duty of This Court to Maintain the Supremacy of the Constitution of the United States and to Thwart the Exercise of Arbitrary and Capricious Power Repugnant to the Federal Constitution.

In the case of *Jones* v. *Securities Exchange Com.*, 298 U. S. 1, 24, 80 L. Ed. 1015, 1025, this court in passing on the action of a commission, which operated to deprive a citizen of his property without due process of law, said:

"The action of the commission finds no support in right, principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which constitutional safe-guards of personal liberty ultimately rest - - that this shall be a government of laws - - because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such contingency the courts have always been vigilant, and if they are to perform the constitutional duties in the future, must never cease to be vigilant to detect and turn aside the danger at its beginning.

"The admonition of Mr. Justice Bradley in Boyd v. United States, 116 U. S. 635, 29 L. Ed. 746, 752 S. Ct. 520, should never be forgotten: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way namely, by silent approaches and slight deviations from legal modes of procedure - - - It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be OBSTA PRINCIPIIS.'

"Arbitrary power and the rule of the constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict."

In the *Barbier* v. *Connolly* case, 113 U. S. 27, 28, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357, this court said with reference to right claimed under the 14th Amendment:

"The 14th Amendment, in declaring that no State 'Shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoilation of property but that equal protection and security, should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and their property. * * *"

Point C

The Judgment of the Court Below is Based on Non-Federal Grounds of Decision Consisting of Misrepresentations of the Law and the Facts and is Therefore Untenable.

Respondent, in its answer brief, contends that inasmuch as the judgment of the court below is based on non-Federal grounds of decision, this court is without jurisdiction to review the same, and cites *Brinkerhoff-Farris Trust and Savings Co.* v. *Hill,* 281 U. S. 673, 680, 74 L. Ed. 1107, in support of its contention.

In the Brinkerhoff case, this court, on December 2, 1929, denied the writ of certiorari (280 U. S. 604, 74 L. Ed. 648). On January 30, 1930, upon reconsideration revoked order of denial and granted the writ (250 U. S. 550, 74 L. Ed. 608), and heard the case on its merits, resulting in a reversal of the judgment of the court below. In passing on the merits of the case, this court said:

> "But while it is for the state courts to determine the adjective as well as the substantive law of the state, they must in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state had no power to destroy unless there is or was, afforded to him some real opportunity to protect it."

The reasoning in the cited case applies with great force to the situation in the case at bar. The Supreme Court of Nebraska based its decision on the question of the statute of limitations on *facts dehors* the record. *It did not accord to the petitioners due process of law.* It decided the point against them on facts not in issue. Petitioners had no opportunity to deny the facts or admit them and show that they were not sufficient to avoid or suspend the statute. In this respect the State of Nebraska, acting through its judiciary, deprived the petitioners of all existing remedies for the enforcement of their substantive right to the benefit of the completed bar of the statute of limitations.

Point D

Respondent's Answer Brief Confirms the Petitioners' Statement That This Case is of Public National Importance.

The matter appearing near the bottom of page 8, respondent's answer brief, demonstrates that a litigant in Nebraska, who dares protest against the arbitrary and capricious practice of the Supreme Court of Nebraska of basing its judgment on facts dehors the record, subjects himself to accusations of being in contempt of court.

Unless the case at bar is heard on the merits and reversed, it will be a precedent for the nullification of the 14th Amendment of the Constitution of the United States in Nebraska thus jeopardizing the private rights of every person within the jurisdiction of the state.

If the practice is not stopped through the supervisory power of this court, it will continue unabated.

Wherefore your petitioners pray that this Honorable Court reconsider the petition for writ of certiorari, revoke the order denying the same, grant the writ as prayed in the petition to the end that the judgment of the Supreme Court of Nebraska may be reviewed and reversed by this Honorable Court.

Respectfully submitted,

WILLIAM NIKLAUS,
MARY V. NIKLAUS,
LOUP RIVER PUBLIC POWER DISTRICT,

By HERBERT W. BAIRD,
Their Attorney.